United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

76-1497

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

DUDLEY D. MORGAN, JR.,

Defendant-Appellant.

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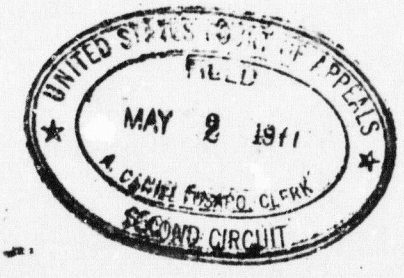
PETITION FOR REHEARING IN BANC
OF DEFENDANT-APPELLANT DUDLEY D. MORGAN, JR.

JAMES C. LANG
Sneed, Lang, Trotter,
Adams, Hamilton & Downie
Fourth Floor
Thurston National Building
Tulsa, Oklahoma 74103
(918) 583-3145



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COMES NOW the Appellant, Dudley D. Morgan, Jr., and moves this Honorable Court for a rehearing *in banc* in the above-styled cause and further moves the Court to reconsider and vacate its decision entered herein on the 18th day of April, 1977.

ARGUMENT AND AUTHORITIES

This Honorable Court should hold upon rehearing that cross-examination of Appellant's character witnesses as to whether their opinion of Appellant would change if Appellant had committed those acts charged in the indictment, constituted a denial of Appellant's right to be afforded the presumption of innocence and the denial of Appellant's right to a fair trial. Additionally, the decision of this Honorable Court is in direct conflict with a recent holding of the Fifth Circuit; is in direct conflict with the analysis by the United States Supreme Court in *Estelle v. Williams*, ____ U.S. ____, 96 S. Ct. 1691 (1976); misapprehends the scope of Rule 405 of the Federal Rules of Evidence; and therefore involves questions of great importance which should be considered by the Second Circuit *in banc*.

The Court appears to have misapprehended the nature of the recent decision in *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977). The Court distinguishes *Candelaria-Gonzalez* from the present case by stating

that in Candelaria-Gonzalez the questions to character witnesses deal with witnesses who testified concerning the defendant's reputation in the community, whereas in the present case, the questioning concerned the character witnesses' own opinions concerning the Defendant's character traits. Appellant submits that a close reading of the full text of Candelaria-Gonzalez does not support the distinction.

It is true that the Fifth Circuit in Candelaria-Gonzalez states:

> "Several witnesses testified as to his [defendant's] general reputation for truth and veracity."

However, the Fifth Circuit proceeds to state:

> "The first such witness testified that such reputation was good. Government counsel on cross-examination asked if Ledesma's [defendant's] indictment would affect the witness's opinion of him and his reputation in general. Defense counsel objected and the district judge ultimately sustained the objection..." [Emphasis supplied.] 547 F.2d at 293.

Thus, it would appear that in Candelaria-Gonzalez a character witness was asked if his own opinion concerning the defendant would be affected by the offense charged in the indictment. However, the trial court in Candelaria-Gonzalez, while allowing such questions concerning the defendant's general reputation in the community, would not go so far as to allow such questions when directed to the personal opinion of the character witnesses. This is further supported by a quotation from the Candelaria-Gonzalez

trial transcript cited by the Fifth Circuit in the fourth footnote of the opinion.

> Q. "Mr. Milligan [prosecutor]: Now since your knowledge of him and your opinion of him relates strictly to air conditioning, I take it the limited opinion you hold would not be affected if he were convicted of narcotics trafficking.
>
> MR. GIBBS [defense counsel]: Your Honor, once again I have to object. The presumption of innocence is with this defendant. He hasn't been convicted and I don't think the prosecutor has a right to assume in a question that he will be convicted. This jury--
>
> THE COURT: I'll sustain the objection. I think you've been over it. I think you've make your point." 547 F.2d at 293, footnote 4.

Certainly there is no language in Candelaria-Gonzalez which would imply that the trial court would have been correct in allowing a hypothetical question based upon allegations in the indictment directed to the witness's own opinion concerning the defendant's character traits. Apparently the Fifth Circuit did not have to consider questions concerning the character witness's own opinion because the trial court sustained objections concerning those questions. In any event, the Fifth Circuit did not note any distinction between questions relating to the defendant's reputation and questions relating to the witness's own opinion.

Suppose, however, that some distinction can be made between "reputation" questions and "personal opinion"

questions. What reason exists for treating the two types of questions in a different manner? This Court's majority opinion gives no reason but merely implies that more liberal cross-examination is allowed when a witness states his own opinion than when he testifies concerning the reputation of the defendant in the community. This analysis, however, begs the question of whether liberal cross-examination can be allowed to deprive defendant of his right to the presumption of innocence. Rule 405 may liberalize the scope of matters which may be inquired into on cross-examination, but certainly Rule 405 was not intended to do away with the presumption of innocence or to allow questions which rest upon an assumption of guilt. The majority opinion appears to have overlooked the whole issue of the presumption of innocence.

Appellant submits there is simply no way to avoid the jarring conflict between the language in Candelaria-Gonzalez and the opinion issued by this Honorable Court. Thus, the Fifth Circuit stated:

> "The questions posed sought speculative responses resting upon an assumption of guilt. Government counsel asked if Ledesma's reputation would be affected if he were convicted of the alleged crime. These hypothetical questions struck at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial. [Citations omitted.] We think that the risk of prejudice to defendant's basic rights from such questions requires reversal. The questions put have no place in a criminal trial."

This strong language of the Fifth Circuit illustrates quite clearly that Appellant's right to the presumption of innocence in the present case was denied him. As has been shown above, there is no valid distinction between the use of such impermissible questions in cases in which the personal opinion of the character witness is at issue rather than the witness's opinion of defendant's reputation in the community.

A point which has evidently been overlooked by this Honorable Court is that a character witness's testimony concerning a defendant's reputation in a community always has, in fact, been that witness's opinion of the defendant's reputation in the community, and has therefore been opinion evidence "in disguise."[1/] Thus, it is difficult to understand this Court's distinction between "reputation" testimony and "opinion" testimony. Candelaria-Gonzalez clearly holds that the asking of such questions as were asked in the present case strikes "at the very heart of the presumption of innocence." Why do questions which are totally improper and which deprive a defendant of his presumption of innocence and constitute reversable error suddenly become permissible when asked in a context involving a witness's opinion concerning specific character traits of a defendant? If in fact this case can be distinguished from Candelaria-Gonzalez,

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1. Notes of Advisory Committee on Proposed Rules, 28 U.S.C.A., Federal Rules of Evidence, Rule 405, p. 148.

the distinction cannot serve as a valid basis to allow this Court to place its stamp of approval upon questions which deny Appellant's right to the presumption of innocence.

The holding of this Honorable Court also is in conflict with United States v. Senak, 527 F.2d 129 (7th Cir. 1975). In Senak, an attorney named Lucas was called as a character witness by the defendant and testified concerning the defendant's reputation in the community for good character traits. On cross-examination he was asked if he had any knowledge as to allegations made by various government witnesses concerning the defendant. In discussing the cross-examination, the Seventh Circuit clearly drew the line as to what would constitute reversable error:

> "Lucas [the attorney] was not asked whether if he had known the incidents to have been true it would affect his opinion. Nor indeed was he asked to express any opinion on the effect of the incidents which were not described to him. Finally at the conclusion of the cross-examination, the witness testified that although he had no personal knowledge of the incidents earlier inquired about, he had read newspaper accounts concerning the allegations and 'of course in the course of association with other professional persons I have generally heard of the gist of the government charges against the defendant...from my past association and experience with the defendant, I would believe that I still feel he is a man of integrity and honesty.'" [Emphasis supplied.] 527 F.2d at 146.

It is interesting to compare Senak with the present case, for in this case three character witnesses were asked the questions. All of them were asked questions

which assumed defendant's guilt and all of them were asked whether, if defendant had in fact committed the acts alleged in the indictment it would affect their opinion. All stated that it would.

The holding of Senak is that questions concerning the alleged facts in the indictment may be asked under certain circumstances to test the knowledge of a character witness who has testified concerning the defendant's reputation in the community. The further implication of Senak, however, is that such a character witness may not be asked whether, if the facts alleged in the indictment are true, it would affect his opinion.

Both the majority opinion and the concurring opinion by this Court consider the questioning by the government to have been improper. The majority opinion asserts that the probative value of the hypothetical question is negligible and that it should not be asked for that reason. The concurring opinion points out that the questions were improper because they asked the jury to assume that the defendant was guilty of the very charge on trial. Thus, both the majority opinion and concurring opinion admit that the question was improper. However, the Court appears to feel that no prejudice to Appellant was shown as a result of the questions. How could such prejudice ever be shown in even the most flagrant case? The Fifth Circuit in Candelaria-Gonzalez, once having concluded that the questions in that case violated the presumption of innocence, did not make any

further inquiry to determine whether the defendant was prejudiced by the questions. In fact, the Fifth Circuit presumes prejudice as a result of such questions stating:

> "We think that the risk of prejudice to defendant's basic rights from such questions requires reversal." [Emphasis supplied.] 547 F.2d at 294.

Thus, the Fifth Circuit requires no specific factual showing of prejudice to the defendant when such improper questions are asked.

Appellant submits that this Honorable Court has overlooked the analysis presented by Mr. Chief Justice Burger in Estelle v. Williams, ____ U.S. ____, 96 S. Ct. 1691 (1976), in determining whether the admittedly improper questions constituted prejudicial error. Recognizing that the right to the presumption of innocence requires that an accused not be compelled to go to trial in jail clothes, Chief Justice Burger then discussed waiver (the controlling factor in Estelle) and harmless error (the factor apparently relied upon in the concurring opinion in the present case).

With regard to harmless error, the Supreme Court cites with approval the following quotation from Harrington v. California, 395 U.S. 250 (1969):

> "We held in Chapman v. California, that 'before a federal constitutional error can be held harmless, the court must be able to deduce a belief that it was harmless beyond a reasonable doubt...'" [Emphasis supplied.] 96 S. Ct. at 1694.

If, as the concurring opinion herein clearly implies, there was a constitutional error (assumption of Appellant's guilt), it was not "harmless error" unless this Court so finds beyond a reasonable doubt. Appellant submits that there is nothing "harmless" about questions which require witnesses and the jury to assume his guilt during the course of the trial, and certainly the government has not shown beyond a reasonable doubt that the errors were harmless.

In addition, actual prejudice is shown by the fact that in asking the improper questions the prosecutor was in reality asking the jury to assume the defendant's guilt. Surely this is a highly prejudical procedure, for once the jury has assumed the defendant's guilt for one purpose it seems incredible to believe that the jury can perform the kind of mental gymnastics required to allow the defendant the benefit of the presumption of innocence at the close of the trial.

Appellant therefore submits that the hypothetical questions asked in the jury's presence and the answers given thereto constitute prejudice per se. The concurring opinion seems to envision situations in which such questions would cause prejudice to a defendant, but denies that Appellant was prejudiced. Appellant submits that there can be no clearer case of prejudice than the present one. Each character witness questioned testified that he would change his opinion concerning Appellant's character if the facts as

alleged in the indictment were true. What further factual showing could have been made in this case (and what further showing could be made in any other case) to show "prejudice" in this type of situation?

WHEREFORE, based upon the argument and authorities set forth above, Appellant prays that the decision rendered by this Court on the 18th day of April, 1977 be vacated and that the case be reversed and remanded for a new trial.

Respectfully submitted,

SNEED, LANG, TROTTER,
ADAMS, HAMILTON & DOWNIE

By _____
James C. Lang
Attorneys for Defendant-Appellant
Fourth Floor
Thurston National Building
Tulsa, Oklahoma 74103
(918) 583-3145

CERTIFICATE OF MAILING

I, James C. Lang, do hereby certify that I mailed a true and exact copy of the foregoing Petition for Rehearing in Banc for Defendant-Appellant Dudley D. Morgan, Jr. to Alan M. Goldston, Special Attorney, United States Department of Justice, One St. Andrew's Place, New York, New York 10007, with sufficient and proper postage thereon this 28TH day of April, 1977.

_____
James C. Lang